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No. 94-2065

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI,
on behalf of themselves and all others similarly situated,
Petitioners,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Introduction

Respondents, the Chief Administrator of the courts of the State of New York and the Commissioner of the New York State Office of Mental Health, respectfully submit this brief in opposition to the petition for certiorari.

The petition should be denied because the issues presented do not merit review by this Court. Petitioners have pointed to no conflict with decisions of this Court or conflict among the courts of appeals, and have raised no important constitutional question which should be settled by this Court.

Statement of the Case

Petitioners, patients involuntarily committed to State psychiatric hospitals in Dutchess County, New York, commenced this action in 1988 in the United States District Court for the Southern District of New York. Petitioners claimed, *inter alia*, that due process requires the appointment of a "consulting" psychiatrist in all involutary commitment or retention proceedings to testify as an expert witness on a patient's behalf if his professional opinion favors the patient's release, and to assist the patient's attorney in preparing the case and formulating strategies for the cross-examination of the State's psychiatrist. In 1991, the district court (Goettel, J.) rejected this claim, and granted summary judgment to respondents. (Petition 49a-59a).

On appeal, the Second Circuit, in an order dated June 10, 1992, affirmed in part, reversed in part, and remanded. 967 F.2d 29 (2d Cir. 1992) (12a-36a). In its decision, the court held that due process does not require the appointment of a consulting psychiatrist in every civil commitment or retention proceeding. In reaching this conclusion, the Second Circuit rejected petitioners' argument that this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), holding that a criminal defendant who demonstrates that his sanity at the time of the offense is likely to be a significant factor at trial is entitled to psychiatric assistance, is applicable to this proceeding. As the circuit court pointed out, this Court elsewhere has specifically stated that civil commitment proceedings "can in no sense be equated" with criminal prosecutions. (Petition, 20a, quoting *Addington v. Texas*, 441 U.S. 418, 428 [1979]). In this respect,

the Second Circuit emphasized the unique nature of civil commitment proceedings, which serve dual goals—"to provide care and treatment to those unable to care for themselves and to protect the individual and society from those who pose a danger to themselves and others because of mental illness." (22a).

The court nevertheless recognized that significant liberty interests are at stake and that, therefore, involuntary civil commitment proceedings must satisfy due process. (20a). Applying the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Second Circuit held that the probable value of the consulting psychiatrist sought by petitioners, and the risk of error if such assistance is not provided, were insufficient to require, under the due process clause, that such a psychiatrist be appointed in every case. In assessing the value of a consulting psychiatrist's testimony, the court pointed out that, under New York law, if a judge determines that expert testimony in addition to that presented by the State is warranted, he may appoint an independent psychiatrist to examine the patient and testify at the hearing. (22a-23a).[1] Since the petitioners do not claim that they are entitled to a consulting psychiatrist who favors non-commitment or release, the appointment of such a psychiatrist would not provide favorable testimony beyond that available from a court-appointed independent psychiatrist. (25a). Thus, the Second Circuit found that the petitioners' right to a testifying psychiatrist not affiliated with the State "is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist." (25a).[2]

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[1] N.Y. Jud. Law § 35(4) provides that a court may appoint up to two psychiatrists. The statute provides for reimbursement of expenses and reasonable compensation, not to exceed two hundred dollars for one psychiatrist and three hundred dollars for two psychiatrists, "except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits."

[2] As to the petitioners' claim that the due process clause requires the appointment of a psychiatrist who would assist counsel in the prepa-

Although it rejected petitioners' claim of entitlement to a consulting psychiatrist, the Second Circuit nevertheless remanded the case to the district court for consideration of whether New York's procedures under the Judiciary Law, as applied, provided reasonable access to the testimony of an independent psychiatrist, where the presiding judge determines that such testimony is necessary to a reliable assessment. Because the record before the court did not permit resolution of this "fact-based claim," the court remanded for further proceedings. (26a-28a).

Upon remand, the parties conducted discovery. Thereafter, the district court again granted summary judgment to respondents, finding that New York's procedures for the appointment of independent psychiatrists, as applied in Dutchess County, satisfied due process, and that the delay occasioned by the appointment of an independent psychiatrist was unavoidable in view of the time necessary for an independent psychiatrist to conduct a thorough examination, the number of psychiatrists available, and their other professional responsibilities. (44a-45a).

On appeal, the Second Circuit, in an order entered November 28, 1994, affirmed. 41 F.3d 800 (2d Cir. 1994). (1a-11a). In its decision, the Second Circuit Court found that the third prong of the *Mathews* test, *i.e.*, the governmental interests, including fiscal and administrative burdens, implicated by additional procedural safeguards, was decisive. (7a).[3] The

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ration of the patient's case, the court found that such a function is not so significant that it is required in all cases. The court pointed out that there is no reason to believe that counsel will be unable to "gain a sufficient level of expertise as to psychiatric matters to meet due process requirements." (26a). The court went on to hold that where counsel can show in a particular case a need for a consulting psychiatrist, he could apply to the state court for such assistance. (26a).

[3] The court also held that although a more prompt examination and report by an independent psychiatrist could reduce the time that erroneously committed patients would spend in a facility, the damage to the patient's interests by such a delay is limited. According to the court, the

court concluded that any delay in obtaining the services of independent psychiatrists was "directly related to the number of psychiatrists in or near Dutchess County who are not associated with the state" and to their other obligations, including their private patients, that "preclude them from acting immediately upon a request to serve as an independent psychiatrist." (7a-8a). Rejecting petitioners' claim that the fees paid to the independent psychiatrists contributed to the delay, the court noted that the record reflects that payments in excess of the statutory $200 are made, and that "the record does not support the conclusion that greater fees would eliminate the delay." (8a).

Petitioners then petitioned for rehearing with a suggestion that the appeal be reheard in banc. The Second Circuit denied the petition on February 2, 1995. (77a).[4]

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delay of a few weeks in obtaining a hearing with the benefit of an assessment by an independent psychiatrist does not involve a "massive curtailment of liberty." (7a).

[4] On May 3, 1995, petitioners filed a motion to proceed *in forma pauperis* without an affidavit of indigence, together with a petition for a writ of certiorari. In that motion, petitioners' attorney, William M. Brooks, explained the absence of an affidavit of indigence by noting that he had not had contact with petitioners Mark Cans and Anna Selletti since 1989 and was thus unable to obtain affidavits from them. He further averred that he had last had contact with petitioner Goetz in 1991, at which time Mr. Goetz informed him that he "was so discouraged and frustrated by his unsuccessful attempts to leave the hospital that he wanted nothing more to do with the law or lawyers and was willing to remain institutionalized for the rest of his life or whenever the hospital chose to release him." On May 30, 1995, this Court denied the motion for leave to proceed *in forma pauperis* without affidavits of indigence. Petitioners subsequently filed the instant petition.

Reasons For Denying The Writ

A. Due Process Does Not Require Psychiatric Assistance In Civil Commitment Proceedings

Petitioners ask this Court to review whether due process requires the appointment of a psychiatrist to assist an indigent patient who is challenging his involuntary commitment to or retention in a psychiatric hospital. Petitioners base their claim on this Court's opinion in *Ake v. Oklahoma*, 470 U.S. at 68, arguing that the present case offers this Court the opportunity to "resolve the question of the applicability of *Ake* to civil commitment hearings." (Pet. at 12). However, that question needs no resolution by this Court.

The Second Circuit's decision is fully in accord with this Court's precedents holding that civil commitment proceedings are not criminal in nature and that the same procedural protections do not apply. *Ake* involved a criminal prosecution in which the defendant raised an insanity defense. This Court recognized that the private interest at stake in a criminal proceeding is "almost uniquely compelling". 470 U.S. at 78. By contrast, this Court has repeatedly recognized that civil commitment proceedings, while undoubtedly involving a significant deprivation of liberty, "can in no sense be equated to a criminal prosecution." *Addington v. Texas*, 441 U.S. at 428. Thus, in *Addington*, the Court held that the criminal standard of proof was not constitutionally mandated in civil commitment proceedings. In reaching this conclusion, the Court recognized that the public and private interests at stake in civil commitment proceedings are different than in criminal proceedings, concluding that "it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. . . . It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." *Id.* at 429. With respect to the risk of erroneous confinements, the Court also recognized that, unlike criminal prosecutions, "the

layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Id.* at 428-429.

Since *Addington*, this Court has repeatedly reaffirmed the distinction between civil commitment and criminal prosecution, holding that the interests involved and the purposes of the proceedings are different, and that therefore the procedural protections applicable in criminal proceedings do not pertain to civil commitments. *See Heller v. Doe By Doe*, 113 S. Ct. 2637, 2645 (1993); *Allen v. Illinois*, 478 U.S. 364 (1986).

Thus, contrary to petitioners' contention, this Court has already addressed the nature of civil commitment proceedings and the procedural protections required. The Second Circuit's decision in this case was no more than a straightforward application of the principles established by this Court, and does not merit the Court's review.[5]

B. Petitioners Were Provided Reasonable Access To Independent Psychiatrists

Petitioners also ask this Court to review whether New York's procedures, as applied in Dutchess County, afford adequate access to independent psychiatric testimony and, in particular, whether the appointment of an independent psychiatrist pursuant to N.Y. Jud. Law § 35(4) causes unreasonable delays in hearings. This issue does not merit review by this Court. The Second Circuit's decision on this issue, which is based on the particular situation in Dutchess County, New York, is limited to the facts there and will have little impact beyond the boundaries of Dutchess County.

Moreover, as the Second Circuit correctly held, adequate access to independent psychiatrists is afforded to involuntary

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[5] In *Procter v. Harris*, 413 F.2d 383 (D.C. Cir. 1969) (Burger, J.), the court, addressing the very argument pressed by petitioners here, reached the same conclusion as the Second Circuit.

psychiatric patients, given the limited availability of psychiatrists and the constraints imposed by their professional schedules. This Court has recognized that, in evaluating whether a delay is reasonable, courts must be cognizant of the "practical realities" of a particular situation, and "must allow a substantial degree of flexibility." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). The Second Circuit and the district court in this case did nothing more than recognize the practical realities facing respondents. By applying traditional due process principles and weighing the competing interests, the courts found no constitutional violation. This unremarkable decision does not merit this Court's review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 18, 1995

Respectfully submitted,

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